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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
Petitioner,
v.
STERLING PRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICI CURIAE

The Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds (the "Funds") are multiemployer plans within the meaning of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1301, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, Pub. L. No. 96-364, codified in principal part at 29 U.S.C. §§ 1381-1461. As described below, the Funds are among the largest multiemployer benefit plans in the United States. The Funds were instrumental in shutting Transcon Lines

("Transcon") down and placing it into bankruptcy after it defaulted on its obligation to the Funds and fell under the control of a reputed organized crime associate. Now, the United States Court of Appeals for the Ninth Circuit has ruled that Transcon's shutdown resulted in the legitimate forfeiture of its principal asset, so that the Transcon estate cannot pay the claims of the Funds, even though they hold claims entitled to priority under 11 U.S.C. § 507(a)(4).

The Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") is a multiemployer defined benefit pension trust fund established in 1955 pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund covers 170,000 retirees presently drawing benefits and 200,000 active participants of approximately 5,000 contributing employers. The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees.

The Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund (the "Health and Welfare Fund") was established in 1950. The Health and Welfare Fund pro-

vides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1]

Interests of Central States

This case arises out of the bankruptcy of Transcon, Inc. In 1990 Transcon was one of the largest contributing employers in the Central States Funds. When the company fell behind on its contributions, and appeared to be insolvent and unable to pay Central States what it owed, Central States sought injunctive relief to restrict Transcon's operations and initiated an involuntary bankruptcy proceeding. Further, Central States sought appointment of a trustee because Transcon had recently been purchased by a company Central States feared was controlled by organized crime.[2] The Funds have filed claims against Transcon amounting to approximately $18,600,000. The right to recover undercharges is the largest asset of the Transcon bankruptcy estate. *See In re Transcon Lines,* 147 B.R. 770, 772 (Bankr. C.D. Cal. 1992) (undercharges are the "primary asset of the Transcon Lines bankruptcy estate"). Without this asset it is certain that Central States will receive little or nothing on its claims. The effect of the decision below is that Central States' prompt action to protect its rights against Transcon has had the perverse effect of eliminating the

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[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees.

[2] The owner of the purchasing company has since been convicted and imprisoned for his racketeering activities.

only significant asset of Transcon, rather than preserving its assets as the Bankruptcy Code requires.

Transcon is not the only such shutdown bankrupt indebted to Central States. The Funds are currently owed over $175,000,000 in health and pension liabilities from the bankruptcy estates of failed contributors, including Transcon. Many of these bankruptcy estates will not be able to pay the Funds, even on their priority claims under 11 U.S.C. § 507(a)(4), if undercharges are forfeited as is required by the decision of the court below in *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) (rejecting Transcon's challenge to the Negotiated Rates Act of 1993 ("Rates Act"), Pub. L. No. 103-180, 107 Stat. 2044-53 (partially codified at 49 U.S.C. § 1071(f)).

In upholding the forfeiture of Transcon's principal asset, the Ninth Circuit stressed the supposedly "unusual" nature of the motor freight carrier industry, namely that a shutdown carrier might be solvent or financially healthy. This statement is contrary to common sense and the Funds' actual experience of the motor carrier and other businesses, whose owners are obligated to contribute to the Funds. Any shutdown business in any industry may, conceivably, be solvent, but the opposite is usually the case, both in the motor freight industry and in the other industries whose employers contribute to the Funds.

The Funds try to protect their financial integrity by preventing employers from dissipating their remaining assets while neglecting to contribute to the Funds. The decision of the Ninth Circuit means that the Funds may cause a forfeiture of the very assets sought to be preserved by shutting down the business of an irresponsible employer.

THE PETITION SHOULD BE GRANTED

The Ninth Circuit's decision in *Transcon* undermines the Bankruptcy Code and ERISA, including the MPPAA, by forfeiting the property of a motor carrier merely because it ceases to transport freight for compensation.[3] Forfeitures conditioned on the shutdown of a for-compensation business operation violate the Bankruptcy Code and ERISA and deprive shutdown employers of assets essential to paying liabilities, including the pension liabilities claimed by Central States, that arise upon shutdown.

The anti-forfeiture provisions of the Bankruptcy Code, 11 U.S.C. §§ 363(l) and 541(c)(1)(B), preclude statutory forfeitures that are conditioned on the bankruptcy, insolvency, or "financial condition" of the debtor. These provisions have vital importance to the Funds and other multiemployer benefit plans. Under the MPPAA the business shutdown of an employer triggers the employer's "withdrawal liability." 29 U.S.C. §§ 1382-83. Under these provisions, upon shutdown, the employer must pay its share of unfunded pension liabilities. Further, if the shutdown employer files bankruptcy, then the employer's bankruptcy estate will be subject to priority wage and pension claims under 11 U.S.C. § 507(a)(3)-(4). If assets are automatically forfeited by the same event that gives rise to the claims, then the claims will be unsatisfied and Congress' purpose in creating these claims will be thwarted. It is for reasons like this that under the Bankruptcy Code the employer's bankruptcy filing also invalidates any statutory (or other) forfeiture of the employer's property based on the employer's bankruptcy, insolvency, or financial condition, thereby preserving the employer's property for distribution to creditors, in-

[3] Under 49 U.S.C. § 10102(13)-(15), the forfeiture provisions of § 2 of the Rates Act apply only to a motor carrier that transports freight "for compensation."

cluding particularly creditors having priority under § 507(a)(3)-(4).

The Ninth Circuit in *Transcon* undermines this statutory scheme by permitting the employer's shutdown of its for-compensation operation to trigger a forfeiture of the employer's assets. In ordering that forfeiture, the Ninth Circuit disregards the language and legislative history of § 9 of the Rates Act. Section 9 provides:

> Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of Title 11, United States Code, relating to bankruptcy; Title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974. (107 Stat. at 2053.)

A principal impetus for the Rates Act was to eliminate the undercharge claims of bankrupt motor carriers. However, the Funds had testified before Congress that the proposed Rates Act threatened to impair the ability of bankrupt motor freight carriers to pay approximately $175,000,000 owed to the Funds for pension withdrawal liability. See The Negotiated Rates Issue and Proposed Legislative Solutions thereto: Hearing before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, H.R. Doc. No. 103-18, 103d Cong., 1st Sess., 151-52, 366-76 (1993) (statements of Thomas C. Nyhan). Whether it was in response to such testimony, or to keep the bill from the jurisdiction of the Judiciary Committee (see Petition at 8-9) or for some other reason, a compromise was struck and the bill was amended to add § 9. The obvious purpose of § 9 was to ensure that the rights of parties under the Bankruptcy Code would not be disturbed by the Rates Act. Yet under the decision below the rights to undercharge claims that companies like Transcon had prior to the Rates Act are extinguished, and a principal purpose of § 9 is not achieved.

It is quite plain, as the court below agreed, that if the property forfeiture required by § 2 of the Rates Act were conditioned on the insolvency or financial condition of *Transcon,* then, because *Transcon* is in bankruptcy, § 9 of the Rates Act would intercede to prevent the forfeiture by mandating the supremacy of §§ 363(l) and 541(c)(1) of the Bankruptcy Code. Those latter (Bankruptcy Code) provisions preclude the forfeiture of property of a bankruptcy debtor based on the debtor's insolvency or financial condition. The question, then, is whether § 2 of the Rates Act is in fact conditioned on the insolvency or financial condition of debtors like *Transcon.*

The court below was rightly concerned that default clauses in leases and contracts not circumvent the anti-forfeiture provisions of the Bankruptcy Code simply by referring to operational status rather than financial condition. "[W]e do not hold that conditioning a default on a debtor's operational status is never prohibited by the Bankruptcy Code's anti-forfeiture provisions." Petitioner's Appendix ("Pet. App.") at 19a. The court below held, nonetheless, that the "unusual nature of the motor freight industry" as it existed before the Rates Act made the financial condition of a company "not necessarily dependent on the continuation of operations." Pet. App. at 19a-20a. The court apparently believed that the very existence of undercharge claims would leave many motor freight companies solvent even if they ceased operations. Thus, according to the court, conditioning the forfeiture of the undercharge claims on the cessation of the companies' operations was not the same as a condition on financial condition. The court apparently missed the irony that the very existence of undercharge claims is what, in its view, saves the statute that, in turn, eliminates the undercharge claims. But if the undercharge claims are eliminated, then the shutdown really is a financial condition: "the financial condition of a motor carrier and its operational status are indeed related." *Id.* at 18a.

By definition, § 2 of the Rates Act is conditioned on the "financial condition" of the motor carrier. Section 2 only applies to a "carrier" that ceases to transport freight. Under 49 U.S.C. § 10102(13)-(15), "carrier" means a carrier that operates "for compensation." When a "for compensation" carriers ceases to transport freight, it necessarily has a financial condition characterized by a lack of revenues from current freight transportation. Further, any for-profit business that shuts down will also have a financial condition characterized by a lack of current revenues from the shutdown business. Any doubt on this point should have been dispelled by the undisputed declaration of Transcon's expert witness, an accountant who submitted a declaration that: "when used to describe a motor carrier of property, the words 'no longer transporting property' refer to and describe the financial condition of the motor carrier, and . . . such financial condition would have to be disclosed in an unaudited financial statement of the motor carrier of property in order for the financial statement to conform with generally accepted accounting principles for the presentation of financial information." *See* Appellant's Excerpts of Record, Vol. 3, pp. 542-43, filed May 20, 1994 in Ninth Circuit No. 94-55425.

Further, the court below actually failed to explain why § 2 of the Rates Act is any different from other contract and least default clauses that create a forfeiture. It tried to explain that because of these undercharge assets a motor carrier might cease trucking operations yet remain solvent. But this is true of many kinds of companies other than motor carriers with undercharge claims. For example, a warehouse operation is a common contributor to Central States under collective bargaining agreements with the International Brotherhood of Teamsters. A warehouse company might shut down yet remain solvent because of its real estate holdings. Now suppose title to the real estate could be forfeited to, say, the principal shareholder upon the cessation of warehouse operations. Would

it be fair to say that the forfeiture was unrelated to the financial condition of the company even though it left the company insolvent? If the court below is correct, Central States, indeed all creditors in bankruptcy, can expect to see their losses grow as such forfeiture clauses multiply.

The Funds agree with the Trustee that the decision of the Ninth Circuit conflicts with the interpretations by other courts of appeals of § 9 of the Rates Act and the words "financial condition" in the Bankruptcy Code. See Trustees' Petition, pp. 24-29.

CONCLUSION

The Trustee's petition should be granted.

Respectfully submitted,

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
* Counsel of Record